IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Criminal Appeal No.147-DB of 1998

Date of decision: 05.03. 2007

Mukhtiar Singh and ors.

-----Appellants.

Vs.

State of Punjab

-----Respondent.

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL

HON'BLE MR JUSTICE H.S. BHALLA

Present: Mrs. Baljit Mann, Advocate
for the appellant.

Mr. M.S. Sidhu, Sr. D.A.G., Punjab
for the respondent.

Adarsh Kumar Goel, J.

The appellants are aggrieved by their conviction and sentence as under:-

Mukhtiar Singh	Under Section 302 IPC	Imprisonment for life and fine of Rs.3,000/- or in default to undergo RI for six months.
Jasbir Singh & Balbir Singh	Under Section 302/34 IPC	Imprisonment for life and fine of Rs.3,000/- each or in default to undergo RI for six months each.
Jasbir Singh	Under Section 323 IPC	To undergo RI for six months.
Mukhtiar Singh & Balbir Singh	Under Section 323/34 IPC	To undergo RI for six months each. Both the sentences are to run concurrently.

The FIR was registered on 12.08.1995 at 11.30 A.M. on the statement of PW-8 Mangal Singh, brother of the deceased Gurdev Singh, to the effect that he, his brother Jagtar Singh and deceased Gurdev Singh alongwith their parents were living together. He was truck driver while his brothers were doing agricultural work. Mukhtiar Singh, his step-brother was living in a separate house. His father Sohan Singh and his elder brother Jagtar Singh were constructing northern wall of the house which had fallen due to rain, while he and his brother Gurdev Singh were in the house. At 9.30 A.M., Jasbir Singh son of Mukhtiar Singh having brick-bat in his hand and Balbir Singh, his maternal uncle's son who was empty handed, came in the street. Balbir Singh raised a lalkara that they will teach a lesson for constructing the wall without leaving a distance. Jasbir Singh hurled a brick-bat, which hit Mangal Singh on the middle of the head. Mukhtiar Singh armed with a .12 bore double barrel gun climbed the upper storey of the house of Angrej Singh and aiming at the complainant party, he fired two shots, which hit Gurdev Singh on his chest and right bicep, on which, Gurdev Singh immediately died. On raising of alarm, the accused fled away. According to Mangal Singh, the grievance of the accused was that the complainant party was constructing a wall, which obstructed Mukhtiar Singh to ply his tractor through the street. Mangal Singh started for going to the police station for lodging of report and on the way he met Major Singh, SHO, P.S. Mallanwala, who recorded his statement at 11.15 A.M.

Major Singh (PW-12) went to the place of occurrence, prepared inquest report on the dead body of Gurdev Singh, sent the dead body for post-mortem, inspected the place of occurrence, lifted bloodstained earth, lifted two empty cartridges from the roof of house of Angrej Singh, prepared rough site plan (Exh.PR) and took into possession clothes of the deceased. He arrested the accused on 21.08.1995. He recorded the disclosure-statement of Mukhtiar Singh, leading to recovery of .12 bore licensed gun and 10 live cartridges. After completing the investigation, he sent the accused for trial.

The prosecution examined PW-1 Dr. Nirmal Dass who conducted post-mortem examination on the dead body of Gurdev Singh on 12.08.1995 at 4.30 P.M. His observations are as under:-

> "On examination, the length of the dead body was 5'-10". It was a dead body of moderately nourished and built young male, mouth was closed, eyes were semi closed, wearing a checkdar kameej, white banian, light badami pent, gulabi kachha and a kesri turban. The kameej and the banian were blood stained and contained numerous circular and oval holes on the front of the chest and upper abdomen, almost corresponding to the injuries on the body. No blackening, scorching/tattooing was present on the clothes. Rigor mortis was present in the face, neck, trunk and particularly in the upper limbs, lower limbs, fingers and toes. The post mortem staining was present on the back of the body, poorly developed and not fixed sparing the areas of contact flattening.
>
> <u>Injuries:-</u>

Multiple punctured lacerated wounds (97 in number) with even distribution were present on the front of chest and upper part of front of the abdomen in epigastric region, 112 cms above from the sole of the foot, the pattern of dispersion of the punctured lacerated wounds laid in the area with a diameter of 27.5 cms i.e. in the area between both the nipples, the super-sternal notch above and epigastric region 12 cms above the umbilicus. The size of the wounds was ranging between 0.75 x 0.5 cm to 0.5 x 0.25 cms. These were oval in shape with the abrasions color present on their upper and right margins. The edges of the wounds were inverted. Clotted blood was present. No blackening, tattooing/scorching was seen.

Similar multiple punctured lacerated wounds (10 in number) ranging in size from 0.75 x .5 cms to 5 x 0.25 cms. Oval in shape, abrasion color on their upper and outer margins, with inverted edges were present over the middle and lower 1/3rd of the right upper arm on the outer and anterior aspects. Clotted blood was present. No blackening/scorching/tattooing was seen.

On opening the chest and abdominal cavities, the injuries and penetrated into the pleural cavities and the peritoneal cavity after lacerating through and through the intervening structures i.e. skin, sub-cutaneous tissues, muscle tissues, fracturing through the costal cartilages of the 4th, 5th, 6th, 7th, 8th ribs on both sides, sternum, both pleurae, parenchyma of both the lungs, the peric radium and the heart and structures of the media stinum and the peritoneum, liver, mesentry of small intestines, stomach and the transverse colon respectively. Both the pleural cavities contained 75 ½ cc of fluid and clotted blood and the peritoneal cavity contained 450 cc of fluid and clotted blood, Metallic pallets numbering 53 were removed from

the above mentioned viscerae, the pleural cavities, posterior chest wall, peritoneal cavity and the retroperitoneal tissues of the posterior abdominal wall, clotted blood was present in the track of the wounds and after removing the metallic pallets, on dissection of the right upper arm also, these were packed, labeled, sealed in a plastic vial containing cotton wool, signed and handed over to the police.

No exit wounds were found on the back of chest, upper abdomen or right upper arm. The peritoneum cavity mixed with gastric contents and fiscal matter.

All the injuries were ante mortem in nature. The cause of death in this case, in my opinion, was the laceration of heart, both lungs and liver, all vital organs, which was sufficient to cause death in the ordinary course of nature.

After post mortem, I handed over to the police, the stitched dead body, alongwith its belongings duly singed, carbon copy of the post mortem report, police papers pages 1 to 14 duly signed by me, a plastic vial containing 53 metallic pallets which was packed, labeled and sealed and signed.

The probable time that elapsed between injuries and death was about immediately and between death and post mortem, it was within about 12 hours."

In cross-examination, he stated that all the injuries on the person of the deceased could be by single shot.

Dr. Om Prakash Bagri (PW-2) medico-legally examined Mangal Singh and found following injury:-

> "2 cms x ½ cm skin deep lacerated wound present on back of right side of head, 8 cms from right pinna and 17 cms from left pinna. Fresh bleeding was present."

This injury was declared to be simple, which could be by a brick-bat.

Mangal Singh (PW-8) and Jagtar Singh (PW-9) fully supported the version of the prosecution. In cross-examination, the suggestion on behalf of the accused was that Mukhtiar Singh fired a shot to save Jasbir Singh from Gurdev Singh who was going to throw a brick-bat on Jasbir Singh. It was also suggested that Jasbir Singh was passing by the side of the wall of the complainant-party, on which, Gurdev Singh abused him, which led to throwing of brick-bats on each other. It was further suggested that cause of quarrel was litigation pending between the parties and not the construction of wall. The suggestion given to Jagtar Singh (PW-9), inter-alia, was that Kartar Singh, brother of father of Jagtar Singh had given power of attorney to Mukhtiar Singh to defend the partition case, which was pending between the parties. Other witnesses examined by the prosecution are PW-3 Mohinder Singh, who proved ownership of tractor of Mukhtiar Singh; PW-4 Jagan Nath, who proved the licensed gun of Mukhtiar Singh; PW-5 HC Baldev Singh; PW-6 MHC Siv Dayal and PW-7 Manjit Singh, who are formal witnesses and who proved their affidavits and PW-10 Ravinder Singh who prepared site plan (Exh.PO). Constable Kahna Ram (PW-11) proved his affidavit

(Exh.PQ). Forensic Science Laboratory reports were also tendered by the prosecution.

In his statement under Section 313 Cr.P.C., the accused Mukhtiar Singh pleaded that the land of Kartar Singh, his father's brother who was living at Dehradun was being cultivated by Sohan Singh and he was not giving any lease money to Kartar Singh. Kartar Singh gave a power of attorney to Mukhtiar Singh and civil litigation was pending. Sohan Singh and his sons were inimical towards Mukhtiar Singh and his sons. On 12.08.1995, at 6.30 A.M., Jasbir Singh was passing by the side of fallen wall of Sohan Singh, on which, Mangal Singh and Gurdev Singh started abusing Jasbir Singh and throwing brick-bats, which was also retaliated by Jasbir Singh by throwing brick bats. On hearing the noise, he came to the roof of Angrej Singh and apprehending danger to the life of Jasbir Singh at the hands of Gurdev Singh, when he was going to throw a brick bat on Jasbir Singh, he fired a shot. No wall was under construction. Balbir Singh was not present.

Similar plea was taken by Jasbir Singh while Balbir Singh pleaded that he was falsely implicated. The accused examined DW-1 Amrik Singh, Registry Clerk.

After considering the evidence on record, the trial Court held the case of the prosecution to be fully proved beyond reasonable doubt, inter-alia, for the following reasons:-

(i) There was no unexplained delay in lodging the FIR; Mukhtiar Singh had admitted the he fired the shot at the deceased in self-defence; the occurrence took place at 9.30 A.M. and statement of Mangal Singh was concluded at 11.15 A.M.

(ii) The FIR could not be held to be ante-timed and a copy of the FIR was given to Constable Kahna Ram (PW-11), who in his affidavit (Exh.PQ) stated that he went to Ferozepur by bus and then to Zira; the distance between Mallanwala and Ferozepur is about 30 Kms. and the distance between Ferozepur and Zira is 35 kms.; the Constable had gone to the office of SSP to deliver a copy of the said report and then he went to Zira, to the residence of Illaqa Magistrate. The time taken could be easily 4-5 hours.

(iii) The dead body reached the hospital at 4 P.M. along with police papers, including the FIR; the post-mortem was conducted at 4.30 P.M., and thus, there was no delay.

(iv) Even if version of Mukhtiar Singh was to be treated as FIR, no right of private defence arose in favour of Mukhtiar Singh; Version of Mukhtiar Singh that the complainant party was giving brick-bats and Mukhtiar Singh had apprehension that Jasbir Singh could receive brick injury, was not tenable.

(v) Version of Jasbir Singh having given brick-bats on the head of Jagtar Singh and Mukhtiar Singh having fired two shots from his gun, one in the chest and the other on the right shoulder of Gurdev Singh, was fully proved.

(vi) Presence of both the prosecution witnesses Mangal Singh (PW-8) and Jagtar Singh (PW-9) was not denied by the accused. Mangal Singh had injury on the vital parts of his body.

(vii) Defence of Mukhtiar Singh having arrived later and there being no common intention, was misconceived.

We have heard learned counsel for the parties and perused the record.

Learned counsel for the appellants raised the following contentions:-

(a) There was delay in lodging the FIR and the FIR was ante timed; the time of occurrence was much earlier to the time of occurrence mentioned by the prosecution, to cover up the delay in lodging the FIR. According to Dr. Nirmal Dass (PW-1), rigor mortis was present in face, neck, trunk, upper limbs, lower limbs, fingers and toes and the time between death and post-mortem was within 12 hours. The post-mortem was conducted at 4.30 P.M. In the inquest report (Exh.PB) in column No.8, it was mentioned that the

"Joint stiffened, eyes closed and mouth open", which showed that rigor mortis had started.

(b) Balbir Singh was not present at the place of occurrence and his presence was not shown in the site-plan.

(c) Mukhtiar Singh did not fire shots by aiming at Gurdev Singh, but only to create a scare to save Jasbir Singh, apprehending that the complainant-party may give a brick-bat blow to Jasbir Singh.

(d) Jasbir Singh had no knowledge that Mukhtiar Singh will fire shots from his gun and thus, he did not share the common intention to cause death; the motive alleged was not proved and on the contrary, motive to falsely implicate the appellants was proved.

Learned counsel for the State supported the conviction and sentence of the appellants.

We find that the evidence of PW-8 Mangal Singh about Mukhtiar Singh having fired two shots from his .12 bore gun, one in the chest and the other on the right shoulder of Gurdev Singh, resulting in death of Gurdev Singh and of Jasbir Singh having given a brick-bat blow on the head of Mangal Singh stands fully established beyond reasonable doubt. The version given by Mangal Singh is straightforward and consistent with the FIR, which was promptly lodged, and could not be shaken in any manner in cross-examination. His version is fully corroborated by the medical evidence on record. In

fact, firing by Mukhtiar Singh, resulting in death of Gurdev Singh and presence of Mangal Singh and Jagtar Singh at the place of occurrence stands admitted by the accused Mukhtiar Singh himself. PW-9 Jagtar Singh had also fully corroborated the version given by Mangal Singh, whose version also could not be shaken in any manner in the cross-examination. Thus, case of the prosecution against Mukhtiar Singh stands proved beyond reasonable doubt.

Plea of delay in loding FIR:

We find no merit in the contention regarding delay in lodging of the FIR or ante timing of the FIR or changing of the time of occurrence by the prosecution to cover up delay in lodging the FIR. The FIR was lodged promptly. Some time was bound to be taken by the brother of the deceased in going to lodge the FIR. Some time was also bound to be taken by the police officials in delivering the copy of FIR to the Magistrate. Thus, the delay occurred has been duly explained. There is no reason to reject the same. Estimate of time between the death and the post-mortem with reference to presence of rigour mortis cannot be taken as accurate or precise.

Modi's Medical Jurisprudence and Toxicology, Twenty-Second Edition (Butterworths), Chapter VIII - "**Death in its Medico-Legal Aspects**", deals with the changes which take place after the death. Cadaveric rigidity, also known as death stiffening or rigor mortis sets in after the muscles lose power of contractility due to irreversible

changes in the muscles of the body. It first appears in voluntary muscles and then in involuntary muscles. It first occurs in the muscles of the eyelids, next in the muscles of the back of the neck and lower jaw, then in those of the front of the neck, face, chest and upper extremities and lastly extends downwards to the muscles of the abdomen.

Time of onset of rigor mortis varies and average period of its onset is three to six hours in temperate climates. In India, its onset commences one to two hours after the death and its duration is 24 to 48 hours in winter and 18 to 36 hours in summer. Rigor Mortis is well developed in about 12 hours but the duration is not rigid and may vary in different situations.

In **Tanviben Pankajkumar Divetia v. State of Gujarat,** AIR 1997 SC 2193, it was observed in para 35: -

> "35…..Dr. Shariff has also stated that in the post mortem report, there was no mention of atmospheric temperature, humidity and movement of air. He has admitted that without assessment of these factors, proper estimate of the time for setting of rigor mortis can be given. He has also stated that rigor mortis was only a rough guide for determining the time of the death and he has also agreed that onset of rigor mortis will be quicker if the muscles are feeble and exhausted and that in case of cut throat injury, rigor mortis sets in early. It is, therefore, quite apparent that in the absence of various factors which had not been noted by any doctor considering which the probable time for onset of rigor mortis and estimation of

> probable time of death with reference to the state or rigor mortis and coolness of the body can be fairly estimated, any opinion as to the time of death, therefore, cannot be held to be wholly reliable…."

In **Thangavelu v. State of Tamil Nadu**, AIR 2002 SC 2759, it was observed in para 5:-

> "5….According to the doctor, in the month of December in a place like Erode the rigor mortis may set in after about 2 to 3 hours after the death. He has stated that for the rigor mortis to reach from the leg to the head, it would take 12 hours and the same would remain in existence for about another 12 hours. Thereafter, it would gradually diminish in the reverse direction i.e. from head to leg taking about another 12 hours and on this basis when he examined the body of the deceased, he found the rigor mortis had reversed almost to the end of the legs….."

In **Kunju Muhammed alias Khumani and another v. State of Kerala**, (2004) 9 SCC 193, para 9, it was noticed by the Hon'ble Supreme court that rigor mortis reached the entire body in seven hours. Relevant observations are:-

> "9……If we apply the yardstick as spoken to by PW 13 of the starting of rigor mortis to the facts of this case then we notice that in the instant case the death must have occurred prior to 8 a.m., because if rigor mortis starts within 4 to 7 hours of death then it would take some time to reach all parts of the body and in the instant case, rigor mortis was found in the entire body of the deceased, therefore, to reach this stage if we take 4 hours as the

> starting point, it would have taken some more time to reach different parts of the body, therefore, we think it is reasonable to take the upper limit of rigor mortis reaching the entire body as 7 hours and if we work backwards then we notice that the death in question must have occurred before 6.30 a.m. on 3-11-1991 which actually fits into the other facts noticed by us hereinabove while discussing the time of death."

In **Mangu Khan and others v. State of Rajasthan**, AIR 2005 SC 1912, referring to the time within which rigor mortis develops all over the body, it was observed:-

> "9….It depends on various factors such as constitution of the deceased, season of the year, the temperature in the region and the conditions under which the body has been preserved. The record indicates that the body was taken from the mortuary. We notice that there is no cross-examination, whatsoever, of the doctor so as to elicit any of the material facts on which a possible argument could have been based. If these are the circumstances, then the presence of rigor mortis all over the body by itself cannot warrant the argument of the learned counsel that the death must have occurred during the previous night. Acceptable ocular evidence cannot be dislodged on such hypothetical basis for which no proper grounds were laid."

Plea of right of Private Defence:

We also do not find any merit in the contention that Mukhtiar Singh fired shots in private defence. In our view, on the facts, it is clearly proved that no right to private defence accrued to Mukhtiar Singh.

The law on the point is well settled. Reference may be made to the judgment of the Hon'ble Supreme Court in ***State of Madhya Pradesh v. Ramesh*** AIR 2005 SC 1186 (para Nos.10 to 17). The burden of proving the plea of self-defence is on the accused though he may establish it by reference to the circumstances emerging from the prosecution evidence itself and the test applied for discharging the burden is pre-ponderance of probabilities. It is true that number of injuries, is not a safe criteria for determining who is the aggressor. Existence of reasonable grounds for apprehending that death or grievous hurt would be caused, has to be shown. In the present case, no reasonable apprehension of danger to the body has been established by the accused.

Plea re: Common Intention:

We may now go to the question as to whether the accused Balbir Singh and Jasbir Singh shared common intention with Mukhtiar Singh, of causing death of Gurdev Singh. It is well settled that any act in furtherance of common intention renders all the persons sharing such intention liable, irrespective of any individual overt act. Individual role can, however, be seen with a view to examine whether a particular accused had shared the common intention of the other. Common intention may develop on the spot also, but must precede the act constituting offence. Common intention must be in respect of the ultimate act, for which, the accused is sought to be punished. These principles have been elaborately dealt with by the Hon'ble Supreme Court in ***Suresh v. State of U.P.*** **AIR 2001 SC 1344** (Paras 36 to 54).

From the case of the prosecution, it is not clearly established that all the three accused had come with a planning to murder Gurdev Singh. They had come to object to construction of wall by the complainant party. Balbir Singh was empty handed while Jasbir Singh was armed with a brick-bat, which could not be necessarily a part of prior planning to cause death. Their presence and participation in the occurrence may possibly suggest their sharing of common intention with Mukhtiar Singh, but such an inference cannot be conclusively drawn on the given facts. Balbir Singh gave a lalkara that the complainant party be taught a lesson without specifying that Gurdev Singh should be killed. Jasbir Singh gave brick-bat blow to Mangal Singh. In these circumstances, possible inference could be that Balbir Singh or Jasbir Singh did not share common intention of Mukhtiar Singh, which has to be inferred from the act of his firing shots from his gun. Intention of Mukhtiar Singh can certainly be inferred, but sharing of the said intention by Balbir Singh and Jasbir Singh may be open to doubt. In these circumstances, we give benefit of doubt on this aspect to Balbir Singh and Jasbir Singh.

As regards the brick-bat injury on the head of Mangal Singh, we are of the opinion that case of the prosecution stands fully established and sharing of common intention by Balbir Singh is also established. We, therefore, uphold conviction of Jasbir Singh under Section 323 IPC and conviction of Balbir Singh and Mukhtiar Singh under Section 323/34 IPC for the injuries caused to Mangal Singh.

In view of above, the appeal of Mukhtiar Singh is dismissed and his conviction and sentence are upheld while the

appeal of Jasbir Singh and Balbir Singh is partly allowed and their conviction and sentences under Section 302/34 IPC are set-aside.

(ADARSH KUMAR GOEL)
JUDGE

March 05, 2007 **(H.S. BHALLA)**
ashwani **JUDGE**